

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

PSC METALS, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 3:17-cv-01088
)	Judge Aleta A. Trauger
SOUTHERN RECYCLING, LLC,)	
)	
Defendant.)	

MEMORANDUM AND ORDER

Pending before the court is a Partial Motion to Defer Ruling on and/or Deny Southern’s Motion for Summary Judgment Pending PSC’s Opportunity to Take Discovery (Docket No. 34), filed by the plaintiff, PSC Metals, Inc. (“PSC”), to which the defendant, Southern Recycling, LLC (“Southern”), has filed a Response in opposition (Docket No. 40.) For the reasons discussed herein, the motion will be granted, and a ruling on Southern’s Motion for Summary Judgment will be deferred until discovery can be taken.

BACKGROUND

PSC and Southern are scrap metal recycling companies with substantial operations in Nashville, Tennessee. In December 2015, they entered into a Confidential and Non-Disclosure Agreement as part of discussions regarding PSC’s potential purchase of Southern’s Nashville assets and business operations. On January 20, 2017, the parties entered into a letter of intent (“LOI”) that granted PSC exclusive negotiating rights for a thirty-day period, followed by three subsequent thirty-day periods contingent upon certain conditions being met by the end of each. The exclusivity period, as extended, ran through May 20, 2017. In early March 2017, Southern received inquiries from an interested third party regarding Southern’s Nashville assets and

business operations. Southern promptly brought the inquiries to PSC's attention. On April 20, 2017, PSC provided a draft Asset Purchase Agreement ("APA") to Southern, to which Southern provided a response on May 10, 2017. PSC then requested an extension of the exclusivity period beyond May 20, 2017; Southern denied the request but continued to engage in negotiations with PSC. On June 9, 2017, nearly a month after the expiration of the exclusivity period, Southern reached out to the interested third party to gauge due diligence requirements. On June 28, 2017, Southern followed up with the third party, providing high level terms for a potential deal. In early July 2017, the interested third party called Southern to express interest in acquiring Southern's Nashville assets and business operations. On July 7, 2017, Southern suspended discussions with PSC via email. The email also stated that Southern had received an expression of interest from a third party "indicating a superior price" and "more favorable terms."

On July 26, 2017, PSC filed suit alleging breach of contract, breach of the duty of good faith and fair dealing, and promissory estoppel (Docket No. 1.) On August 17, 2017, before discovery had begun, Southern filed a motion for summary judgment (Docket No. 29). On August 25, 2017, PSC filed a Motion to Defer Ruling on and/or Deny Southern's Motion for Summary Judgment Pending PSC's Opportunity to Take Discovery (Docket No. 34), to which Southern filed a Response in opposition (Docket No. 40.)

LEGAL STANDARD

Rule 56(d) governs summary judgment disputes in which the opposing party, for valid reasons, cannot present facts essential to its opposition. The rule reads as follows:

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;

- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

Summary judgment is premature until parties have a full opportunity to conduct discovery. *Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012). Thus, a Rule 56(d) motion requesting time for discovery should be granted “almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence.” *Id.* “A party invoking [the] protections [of Rule 56(d)] must do so in good faith by affirmatively demonstrating . . . how postponement of a ruling on the motion will enable him . . . to rebut the movant's showing of the absence of a genuine issue of fact.” *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 623 (6th Cir. 2014) (internal citations omitted). “Although Rule 56(d) itself does not limit the scope of discovery, under some circumstances it is appropriate . . . to permit only limited discovery targeted at the specific facts that are material to the motion for summary judgment.” *Sagar v. Lew*, 309 F.R.D. 18, 20 (D.D.C. 2015) (internal citations omitted).

The court must consider the following factors in ruling on a Rule 56(d) motion: (1) when the plaintiff learned of the issue on which it seeks discovery; (2) whether the discovery sought would change the ruling; (3) the length of the discovery period; (4) whether the plaintiff has properly pursued any prior discovery; and (5) the responsiveness of the defendant to prior discovery requests. *See Kohus v. Ohio State Highway Patrol*, 310 F.R.D. 549, 550 (S.D. Ohio 2015) (citing *Plott v. Gen. Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1196-97 (6th Cir. 1995)).

ANALYSIS

PSC satisfies its Rule 56(d) burden for deferral of ruling on Southern's Motion for Summary Judgment pending discovery. PSC submitted the affidavit of Ronald Kline, which

articulates what evidence PSC seeks via discovery, why the evidence sought is necessary for PSC's opposition to Southern's motion, and why Southern is in exclusive control of the evidence sought. In short, PSC alleges that Southern violated the terms of the LOI by engaging with a third party or altering its behavior on the basis of third party interest during the exclusivity period. The record indicates that an interested third party contacted Southern during the exclusivity period and that Southern began negotiations with the third party immediately after halting discussions with PSC. PSC also points to aspects of Southern's conduct—such as the changing of significant material terms in the LOI or Southern's delayed response to the draft APA—which might constitute bad faith if contextualized with evidence that Southern was actively seeking a better deal. PSC has no mechanism beyond discovery to determine whether, during the exclusivity period, Southern engaged with the third party or altered its behavior in a way meant to foreclose reaching a deal with PSC. Southern is in exclusive possession of any such evidence, if it exists.

Both *Plott* factors applicable to this case support allowing discovery. It is likely that the evidence PSC seeks would change the ruling on Southern's Motion for Summary Judgment: it may well be dispositive. PSC's charges hinge on its belief that Southern breached its exclusivity obligations under the LOI. Without evidence of such a breach, Southern would be entitled to summary judgment. Further, the length of the discovery period weighs heavily in PSC's favor, given that no discovery has yet been taken. Thus, PSC is entitled to discovery under Rule 56(d). Because the only evidence PSC seeks that is relevant to Southern's Motion for Summary Judgment is evidence related to a potential breach of the exclusivity provision, the court orders discovery limited to that issue. This includes any internal or external communications of Southern during the exclusivity period that relate to negotiations with, contacts with, and

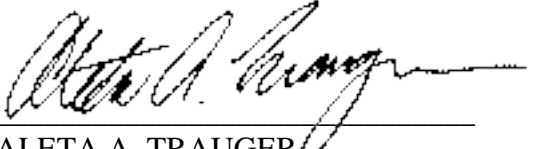
disclosure of confidential information to any third party interested in making an offer for Southern's Nashville assets and business operations. Discovery shall be limited to 60 days from the issuance of this Order.

CONCLUSION

For the foregoing reasons, PSC's Partial Motion to Defer Ruling on and/or Deny Southern's Motion for Summary Judgment Pending PSC's Opportunity to Take Discovery is hereby **GRANTED**. Ruling on Southern's Motion for Summary Judgment will be deferred. The court orders a 60-day discovery period limited to any communications Southern had with or regarding third parties concerning a sale or transfer of a material portion of Southern's assets, stock, or membership units during the exclusivity period with PSC. PSC's response to the pending summary judgment motion shall be filed by January 12, 2018, and Southern may file an optional reply by January 22, 2018.

It is so **ORDERED**.

Enter this 4th day of October 2017.



ALETA A. TRAUGER
United States District Judge